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Supreme Court, U.S.
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No. 94-1652

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Sean Chambers,
Larry Closser,

Petitioners,

v.

David L. Pelfrey,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A GUARD UPON A PRISON INMATE CONSTITUTES "PUNISHMENT" WITHIN THE MEANING OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

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REPLY ARGUMENT

This case requires Supreme Court review in order to resolve the issue of whether an isolated and unauthorized assault by a prison guard on a prison inmate is "punishment" under the Eighth Amendment. Although Respondent never asserts that the assault was anything but an isolated and unauthorized act, he nonetheless argues that the cutting of his hair constituted punishment. Respondent supports his argument by noting that various cultures throughout history have viewed certain types of hair cutting as punishment. Respondent's argument is neither authoritative nor persuasive.

Respondent may well be correct when he states that in Germany and India the cutting of one's hair after being convicted of witchcraft served as a severe form of punishment. It does not follow, however, that the cutting of a prisoner's hair is in and of itself a form of punishment. In order for the cutting of hair to be punishment for Eighth Amendment purposes it must be "deliberately administered for a penal or disciplinary purpose." *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 2325 (1992), *quoting Johnson v. Glick*, 481 F.2d 1028, 1032 (2nd Cir. 1973), *cert. denied sub. nom.*, 414 U.S. 1033 (1973). Nowhere in the record is it alleged that there was any such purpose in the instant case.

Upon close examination it becomes apparent that in every example supplied by Respondent, the cutting of a prisoner's hair was an official response for the purpose of chastising or rehabilitating the offender. Respondent fails to consider the context in which the act of cutting a prisoner's hair is done. The official act of cutting a prisoner's hair to which religious or political significance is placed is wholly different from the act of cutting a prisoner's hair out of personal animus.

Even if Respondent were able to establish that the cutting of his hair was for some disciplinary or penal purposes his claim must still fail. Courts have uniformity held that when it comes to issues of cutting a prisoner's hair, they will defer to the discretion of the prison administrators. *Scott v. Mississippi Dept. of Corrections*, 961 F.2d 77 (5th Cir. 1992); *Rinehart v. Brewer*, 491 F.2d 705 (8th Cir. 1974). As one court stated:

> A *fortiori* it may be said that the federal courts will not undertake the duty and responsibility of supervising the length and style of prison inmates hair. The supervision of the internal affairs of correctional institutions including the discipline and care of inmates rests with the prison administrators and is not ordinarily subject to judicial review.

Hutchinson v. Anderson, 366 F. Supp. 795 (E.D. Okla. 1973).

Consequently, if the cutting of Respondent's hair by Petitioners is considered to be an official act, absent compelling circumstances, the federal courts will not interfere. Petitioner, of course, in no way believes that the cutting of Respondent's hair was anything but an isolated and unauthorized act. And in the context of this case, such alleged cutting of hair was entirely de minimis.

Respondent further argues that this case does not merit Supreme Court Review because there is no conflict between the Circuits on the issue of whether an isolated and unauthorized assault constitutes punishment. In his reply, however, Respondent fails to consider the Eleventh Circuit decision in *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991).

The *Davis* decision, by holding that an isolated and unauthorized assault by a prison guard on a prison inmate is not punishment is in direct conflict with both the Sixth and Ninth Circuits. This Court has itself recognized this unsettled question in *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995 (1992). Therefore, review by this Court is critical to guide the lower court in future cases of this type.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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